



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the DNR Abatement Action to  
Remove the Alleged Illegal Culvert Placed or  
Maintained by Donald and Shirley Miller on the  
Bed of the South Branch of Beaver Creek, Town of  
Brazeau, Oconto County, Wisconsin

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Case No.: 3-NE-01-454

**AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

Department of Natural Resources' staff (Department) conducted field investigations beginning in May of 2000 and allege that Donald and Shirley Miller are maintaining a culvert in the south branch of Beaver Creek in the Town of Brazeau, Oconto County without a permit. On February 22, 2002, the Department filed a request for hearing with the Division of Hearings and Appeals.

Pursuant to due notice, a hearing was held in Oconto, Wisconsin on May 30, 2002, before Mark J. Kaiser, Administrative Law Judge (the ALJ).

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Donald and Shirley Miller, by

Attorney Terrence J. Woods  
P. O. Box 57  
Oconto Falls, WI 54154

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh  
P. O. Box 7921  
Madison, WI 53707-7921

1. Donald and Shirley Miller own real property located in the SE ¼ NW ¼, Sec. 11, T30N, 19E, Town of Brazeau, Oconto County. The south branch of Beaver Creek flows through the Miller property.

2. The stretch of Beaver Creek flowing through the Miller property is navigable-in-fact. The record contains no evidence that any boat has ever navigated this stretch of Beaver Creek. However, the testimony of the Department's Water Management Specialist (WMS), Robert Rosenberger, is that the south branch of Beaver Creek is approximately eight to ten feet wide and six inches to two feet deep. The stream has a defined bed and bank, has an ordinary high water mark, and is capable of floating a watercraft of the shallowest draft. Under the navigability test set forth by the Wisconsin Supreme Court in DeGayner and Co. v. DNR, 70 Wis. 2d 936, 236 N.W.2d 217 (1975), the south branch of Beaver Creek is navigable.

3. A culvert has been placed on the bed of the south branch of Beaver Creek on the stretch flowing through the Miller property. The primary purpose of the culvert is to enable farm machinery to cross Beaver Creek. The bottom of the downstream side of the culvert is located approximately two feet above the water level of the stream during normal ice-free conditions.

4. The Department became aware of the existence of the culvert through a complaint from an anonymous telephone caller to WMS Robert Rosenberger. Pursuant to Wis. Stat. § 130.123, a permit is required to construct a bridge over a navigable stream. The definition of "bridge" for purposes of Wis. Stat. Ch. 30 is found at Wis. Stat. § 30.01(1g). The definition of "bridge" expressly includes culverts. No permit has been applied for or issued for the culvert placed on the bed of the south branch of Beaver Creek on the stretch flowing through the Miller property.

5. The south branch of Beaver Creek has a population of naturally reproducing trout and is classified by the Department as a Class I Trout Stream. The culvert is detrimental to the public interest in Beaver Creek because it obstructs the movement of fish upstream. Trout move upstream in spring and summer seeking colder water and for spawning.

### Discussion

The relevant facts in this matter are not seriously disputed. A culvert exists on the bed of the south branch of Beaver Creek on the stretch flowing through the Miller property. No permit has been issued for the culvert. The arguments raised by the Millers are that the Department has no jurisdiction in this matter because the south branch of Beaver Creek is not navigable and that no permit should be required for the subject culvert because it was constructed prior to the enactment of Wis. Stat. § 30.123. With respect to the navigability issue raised by the Millers, the record contains no evidence that anyone has actually navigated this stream. However, as discussed in the Findings of Fact, the test for navigability is set forth in DeGayner. Under the DeGayner test, the south branch of Beaver Creek is navigable and subject to the Department's jurisdiction.

The Millers other argument is that the culvert was constructed prior to the enactment of Wis. Stat. § 30.123 and should be allowed to exist without a permit. This argument is also not persuasive.<sup>1</sup> It is not clear from the evidence presented at the hearing when the currently existing culvert was actually constructed. However, even assuming that the culvert was constructed prior to the enactment of Wis. Stat. § 30.123, Wis. Stat. § 30.123(2) provides that “no person may construct or maintain a bridge in, on or over navigable waters unless a permit has been issued by the department under this section.” Donald and Shirley Miller have maintained the culvert since they became the owners of the property and a permit is required in order to maintain the culvert.

Donald Miller testified that since he and his wife have owned the property he has not actively performed any maintenance on the culvert. In the context of Wis. Stat. § 30.123, “maintain” is not limited to actively performing maintenance but also includes passively allowing the culvert to continue in existence. The Millers have maintained the culvert since they became the owners of the property and are the proper party against whom the Department should direct the enforcement action.

### CONCLUSIONS OF LAW

1. The culvert placed on the bed of the south branch of Beaver Creek on the stretch flowing through the Miller property constitutes a bridge within the definition of “bridge” at Wis. Stat. § 30.01(1g), Stats.
2. Pursuant to Wis. Stat. § 30.123(2) no person may place or maintain a bridge over a navigable waterway without a permit. No permit has been applied for or issued for the culvert. Accordingly, the culvert is being maintained by Donald and Shirley Miller in violation of Wis. Stat. § 30.123.
3. Pursuant to sec. 30.294, Stats., as a violation of sec. 30.123, Stats., the culvert constitutes a public nuisance.
4. The Division of Hearings and Appeals has the authority to issue the following order.

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<sup>1</sup> Along with the assertion that that the culvert was constructed prior to the enactment of Wis. Stat. § 30.123, the Millers also argue that they were not the owners of the property at the time the culvert was constructed and; therefore; the enforcement action should not be directed at them. This argument is somewhat disingenuous. The evidence presented at the hearing is that at the time the culvert was constructed, the land was owned by Shirley Miller’s father and that Donald Miller was farming the land along with his father-in-law. Donald Miller assisted with the construction of the culvert and the culvert was placed largely for his benefit. Donald Miller testified that the culvert was constructed to replace a bridge at the same location. The culvert enabled Donald Miller to drive farm machinery across the stream and gain access to fields on the other side.

## ORDER

The culvert at issue is being maintained by Donald and Shirley Miller in violation of Wis. Stat. § 30.123 and is declared a public nuisance pursuant to Wis. Stat. § 30.294. Donald and Shirley Miller are ordered to take the following steps to abate this public nuisance:

1. Remove the culvert and all fill on the bed of the creek underneath the culvert from the creek by August 1, 2002.
2. Use and maintain proper erosion control measures, including the use of silt fencing and staked hay bales, during and upon completion of the project.
3. Immediately seed and establish all erodible areas with a fast growing grass seed mixture which must be growing on all exposed soil by August 15, 2002.
4. Contact Robert Rosenberger at 715/ 582-5041 at least 5 days prior to removing the culvert.
5. Do not remove the culvert until a Department representative is onsite to direct removal efforts.
6. Begin and complete the culvert removal and installation of erosion control (including the seeding of the area) within one 24-hour period (i.e. the same day).
7. Grade the side slopes adjacent to the culvert to a 3:1 slope.
8. Deposit all fill material that is removed in an upland area.
9. Do not deposit any fill within any wetland areas.
10. Do not place a culvert or bridge in, on, or over this creek until you apply for and obtain a permit to do so from the Department. (NOTE: Since this is a Class 1 Trout Stream, it is more likely that a permit would be issued to install a clearspan bridge, rather than a culvert.)

11. Remove the culvert, and restore the creek to the satisfaction of the Department.

Dated at Madison, Wisconsin on July 24, 2002.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By: \_\_\_\_\_  
MARK J. KAISER  
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.